

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTON RAMONT PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

June 11, 2013

No. 309661

Kent Circuit Court

LC No. 11-006797-FH

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 18 to 50 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues on appeal that his trial counsel was ineffective for failing to request jury instructions on self-defense and the lesser included offense of assault and battery, and that the trial court erred in denying his motion for a new trial based on those claims. "This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Where no evidentiary hearing was held on the issue of counsel's performance related to these matters, review is limited to mistakes apparent on the record. *People v Fonville*, 291 Mich App 363, 382; 804 NW2d 878 (2011). To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 675; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*, 462 Mich at 302-303, citing *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997).

On the record before us, we conclude that defendant's trial counsel performed within an objective standard of reasonableness with regard to jury instructions. First, the evidence did not support a self-defense instruction. Generally, a defendant is entitled to a theory or defense that is supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). In regard to a self-defense instruction, two witnesses testified that the victim struck defendant first and another said that the victim threatened to strike defendant first. However, five of the

witnesses said that after the initial confrontation, the victim fell to the ground, and defendant then either punched or kicked the victim at least one time. Two of the witnesses specifically testified that the victim was unconscious when defendant struck him on the ground. Thus, the evidence at trial revealed that defendant's continued attack while the victim was on the ground was excessive and was unnecessary for self-defense. See *People v Heflin*, 434 Mich 482, 509; 456 NW2d 10 (1990).

Similarly, defendant was not entitled to a jury instruction on assault and battery. A jury instruction may, when appropriate, be given in regard to lesser included lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). "A necessarily included lesser offense is an offense in which all its elements are included in the elements of the greater offense such that it would be impossible to commit the greater offense without first having committed the lesser offense." *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004). Assault and battery is a lesser included offense of assault with intent to do great bodily harm less than murder because it would be impossible to commit the greater offense without committing assault and battery. *People v Railer*, 288 Mich App 213, 214 n 1; 792 NW2d 776 (2010). However, a lesser included offense instruction is appropriate only where "the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Apgar*, 264 Mich App at 326-327, quoting *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

Here, intent was not a disputed factual issue. Defendant's defense was that he was not the perpetrator. Moreover, a rational view of the evidence would not support an instruction regarding simple assault and battery where the evidence overwhelmingly showed that defendant intended great bodily harm. Cf. *Apgar*, 264 Mich App at 326-327. Five witnesses said that defendant punched or kicked the victim once he was on the ground. Four witnesses said that defendant punched or kicked the victim in the head while he was on the ground. Two witnesses said that defendant punched or kicked the victim in the head multiple times. Additionally, the victim received blunt force trauma to both sides of his brain, indicating that the victim was struck multiple times to the head. As a result of the incident, the victim suffered a traumatic brain injury, approximately 15 head fractures, and dramatic loss of neurological function. Thus, the evidence overwhelmingly supported only one inference, specifically that defendant intended to cause the very significant bodily injuries the victim suffered.

Accordingly, we find that defendant was not entitled to an instruction on self-defense or assault and battery, and thus, defense counsel was not ineffective for failing to make a meritless motion or objection in regard to the jury instructions. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Furthermore, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Cress*, 468 Mich at 691.

Defendant also makes an unpreserved argument that prosecutorial misconduct in the form of witness intimidation occurred in this case. However, based on the relevant witness's testimony, the police merely suspected that witness was lying to them and informed her that false testimony could result in a perjury charge with a penalty of 20 years' imprisonment. Informing a witness that false testimony could result in a perjury charge does not constitute prosecutorial intimidation. *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999).

Defendant next argues that the trial court abused its discretion in departing from the recommended minimum sentence range. We disagree. “A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). Reasons for departure are substantial and compelling where they are “objective and verifiable” and “of considerable worth in determining the length of the sentence and . . . keenly or irresistibly grab the court’s attention.” *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). A reason is “objective and verifiable” where “the facts to be considered by the court [are] actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and [are] capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A departure may not be based on “an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007), quoting MCL 769.34(3)(b).

In reviewing a departure from the sentencing guidelines range, whether a factor that may justify an upward departure exists is a factual determination reviewed for clear error. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). Whether a factor is objective and verifiable is reviewed de novo, while whether a factor is a substantial and compelling reason to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Id.* at 265-266. An abuse of discretion occurs when a trial court’s decision is outside a principled range of outcomes. *Id.* at 269. A trial court’s factual findings at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

Here, the trial court departed from defendant’s recommended minimum sentence range of 34 to 134 months’ imprisonment for three reasons. First, the trial court found that the 25 points scored for Offense Variable (OV) 3, MCL 777.33, inadequately reflected the severity of the victim’s injuries. MCL 777.33(1)(c) provides that 25 points may be scored for OV 3 where “[l]ife threatening or permanent incapacitating injury occurred to a victim.” Here, the victim suffered extensive brain injuries as a result of the attack, had essentially no neurological function, and was in a coma. We agree that the victim’s long-term hospitalization and total incapacitation were not adequately weighed by OV 3.

Second, the trial court found that OV 5, MCL 777.35, should have been scored based on the psychological injury to the victim’s family. MCL 777.35(1)(a) provides that 15 points may be scored for OV 5 where “[s]erious psychological injury requiring professional treatment occurred to a victim’s family.” However, OV 5 may only be scored for the offenses of “homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder.” MCL 777.22(1). Here, the trial court stated that “[b]ut for [MCL 777.22(1)], 15 points would be scored” based on the victim’s family suffering serious psychological injury, particularly regarding whether to maintain the victim on life support. Accordingly, the trial court properly found that OV 5 provided a reason for departure in this case.

Third, the trial court found that the 50 points scored for OV 7, MCL 777.37, inadequately reflected the severity of the attack by defendant. MCL 777.37(1)(a) provides that 50 points may be scored for OV 7 where “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” “Excessive brutality” requires behavior that is more savage or inhuman in comparison to the brutality of the crime. *People v Glenn*, 295 Mich App 529, 533; 814 NW2d 686 (2012), lv gtd 491 Mich 934 (2012). Here, two of the witnesses testified that defendant punched or kicked the victim multiple times in the head when the victim was unconscious on the ground. An expert witness testified that the victim required resuscitation and emergency surgery to relieve the pressure on his brain and to remove blood clots in his brain. The trial court’s factual finding that defendant perpetrated a “terrible assault” that beat the victim to the point of death was not clear error.

The reasons for the upward departure were objective and verifiable because the facts relied on by the trial court were external to the court and others and were capable of being confirmed. Also, the reasons for departure were of considerable worth in determining the length of the sentence and keenly grabbed attention because the reasons were based on factors within the Michigan Legislature’s sentencing guidelines. See *Smith*, 482 Mich at 306 (holding that in justifying the extent of a departure, a trial court may place the facts within the rubric of the legislature’s sentencing grid). Thus, the reasons above were substantial and compelling reasons for departure. *Id.* at 299.

Based on the reasons for departure, the trial court found that OV 3, if possible, should have been scored at 50 points [twice what was originally scored under the sentencing guidelines], that OV 5 should have been scored at 15 points [it was originally scored at zero points], and that OV 7, if possible, should have been scored at 100 points [twice what was originally scored under the sentencing guidelines]. The trial court found that defendant should have received an OV score of 205 points, approximately 2-1/2 times the maximum cutoff OV score of 75 points for Class D offenses under MCL 777.65. Accordingly, the trial court held that the appropriate sentencing guidelines range in this case was twice the sentencing range under the maximum cutoff score; a total of 68 to 268 months. The trial court sentenced defendant to a minimum sentence of 18 years’ [216 months’] imprisonment. Because the trial court based the extent of its departure on the Michigan sentencing guidelines, the trial court sufficiently explained why the sentence it imposed was more proportionate than a sentence within the original guidelines recommendation. *Smith*, 482 Mich at 304; see *Babcock*, 469 Mich at 263-264 (recognizing that the Michigan Legislature subscribed to the principle of proportionality when it promulgated the sentencing guidelines). The trial court did not abuse its discretion in departing from the recommended minimum sentence range under the legislative guidelines. *Babcock*, 469 Mich at 265-266; MCL 769.34(3).

Defendant also argues that the trial court abused its discretion in denying defendant’s request for a *Ginther*¹ hearing. However, a *Ginther* hearing was not required because defendant

¹ *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

did not set forth any facts regarding his motion for a new trial that required development of the record. *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

Defendant additionally raises a series of claims of prosecutorial misconduct in his Standard 4 brief. Defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Prosecutorial misconduct occurs if a defendant is denied a fair trial, *Watson*, 245 Mich App at 586, and claims of prosecutorial misconduct are reviewed case by case, with the prosecutor's remarks evaluated in the context of the entire record, *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

Defendant first claims that the prosecutor improperly injected comments about defendant's character and that those claims were unsupported by the record. However, we have reviewed those comments and find that they were supported by the record and that, in the context of the entire record, they did not improperly comment on defendant's character. Cf. *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992).

Defendant also argues that the prosecutor improperly injected her personal opinion about defendant's guilt within her opening statement. However, "[t]he purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). And, in context, the prosecutor's challenged statement was designed to indicate to the jurors what she intended to show from the evidence. The prosecutor did not express a personal opinion about defendant's guilt.

Defendant further claims that the prosecutor's use of the words "trust me" within her closing argument allowed the jury to conclude that her words held more weight than others. However, in context, the prosecutor's "trust me" comment did not support defendant's guilt with the authority of the prosecutor's office. Similarly, we disagree with defendant's claim that the prosecutor's statement during her closing argument that the victim "was no threat to anybody" was not supported by the evidence.

Defendant's final claim of prosecutorial misconduct is that the prosecutor improperly referred to a letter during opening statement that was not subsequently admitted into evidence. However, the trial court properly instructed the jurors that the lawyers' statements are not evidence. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). No reversal is required because defendant fails to show prejudice from the prosecutor's reference to the letter. *Carines*, 460 Mich at 763.

Defendant next raises a series of additional, unpreserved claims of ineffective assistance of counsel, none of which have merit. Our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defendant first claims that defense counsel failed to conduct reasonable investigations into this case. However, there is no indication that defense counsel failed to investigate this case, and defendant fails to meet his burden of establishing the factual predicate for this claim of ineffective assistance of counsel. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also claims that defense counsel failed to object to the prosecutor misconduct discussed *supra*. However, the claims of misconduct were meritless, and defense counsel is not ineffective for failing to make meritless objections. *Gist*, 188 Mich App at 613.

Defendant also claims that defense counsel was ineffective for failing to object to the trial court's aiding and abetting jury instruction. However, the instruction was proper because a defendant may be charged as a principal and be convicted under an aider and abettor theory. MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). The evidence in this case supported the instruction.

Finally, defendant claims that defense counsel was ineffective because he denied defendant his right to testify. Here, there is no indication that defense counsel failed to advise defendant of his right to testify. The factual predicate of this claim has not been established. *Hoag*, 460 Mich at 6.

Affirmed.

/s/ Henry William Saad

/s/ Peter D. O'Connell